DOCUMENT RESUME

ED 271 385 SO 017 357

AUTHOR O'Connor, Alice; Henze, Mary L.
TITLE During Good Behavior: Judicial Independence and Accountability. A Guide for Discussion of Proposals to Establish Terms of Office for the Federal Judiciary.
INSTITUTION Jefferson Foundation, Washington, DC.
PUB DATE 84
NOTE 23p.; For other guides in this series, see SO 017 351-358.
AVAILABLE FROM The Jefferson Foundation, 1529 18th Street, NW, Washington, DC 20036 ($1.00).
PUB TYPE Guides - Classroom Use - Guides (For Teachers) (052)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Civics; *Constitutional History; *Court Judges; *Court Role; Educational Resources; *Federal Courts; Federal Government; Governmental Structure; Instructional Materials; Political Science; Secondary Education; Teaching Guides; United States Government (Course)

ABSTRACT

A discussion guide, one in a series on constitutional reform issues developed by The Jefferson Foundation as a part of The Jefferson Meeting on the Constitution project, examines proposals to establish terms of office for the Federal judiciary. The first section discusses the historical background of the Federal judiciary including the issues of appointment, the paradox of independence, and accountability. The British example and the Anti-Federalist opposition are also examined. The second section covers partisanship and the courts and the issue of establishing terms. The third section lists arguments for and against establishing terms and arguments for and against elections by the people. The final section outlines a brief legislative history of judicial tenure form 1791 to 1984. (RSL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED271385

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☐ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"DURING GOOD BEHAVIOR"

Judicial Independence and Accountability

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

William R. Merriman, Jr.

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

SP017357

A Guide for Discussion of Proposals to Establish Terms of Office for the Federal Judiciary

This discussion guide is one in a series on constitutional reform issues developed by The Jefferson Foundation as part of The Jefferson Meeting on the Constitution project. It may be photocopied in part or in full if attributed as follows: "Reprinted from a series of discussion guides on constitutional reform issues published by The Jefferson Foundation, Washington, DC." The Jefferson Foundation would appreciate notification from those who reproduce this material for use in other programs.

Written by Alice O'Connor and Mary L. Henze

Copyright ©1984 by The Jefferson Foundation

Library of Congress Catalog Card No. 84-180932

The reproduction and distribution of this booklet for use at the Virginia Jefferson Meeting is made possible by a grant from the Virginia Foundation for the Humanities and Public Policy.

"Article—

The judges, both of the Supreme and inferior courts shall hold their offices for terms of ___ years, and will be eligible for unlimited reappointment by the President, subject to reconfirmation by the Senate."

The judicial branch is an American innovation. As the branch founded to uphold the supremacy of the Constitution, it represents what was truly revolutionary about the founding of the American republic. The Constitution is the sovereignty of the people, and no elected government can usurp that fundamental right of self-government as long as the Constitution is preserved as the charter of the country. The Court protects this unique and revolutionary right and symbolizes the continued integrity of the system.

If the Supreme Court inspires pride, it has also provoked opposition throughout its existence, perhaps because it has come to play a much larger part in forming the law of the land than ever anticipated by its creators. One attempt to control the judiciary has been to make it accountable by instituting terms of office.

The Fight Against "Usurpations"

The leading feature of the Supreme Court—its independence—stems directly from the colonial experience with the British judicial system. Colonial judges were originally appointed to office during good behavior. But they quickly became dependent on the King when in 1761 the tenure provision was altered to "during the royal pleasure." The judiciary's subordination to the monarch was sealed by 1772, when Massachusetts Superior Court judges were paid from the royal instead of the colonial purse.

Such measures only fueled the revolutionary fires. In the Declaration of Independence, Thomas Jefferson listed among the "REPEATED injuries and usurpations, ALL HAVING in direct object the establishment of an absolute tyranny over these states" the charge that the King

> *has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers. He has made judges dependent on his will alone for tenure of their offices, and the amount and payment of their salaries.*

A "good behavior" term was a feature of most of the revolutionary state constitutions; it was one of the first things to be agreed upon at the Constitutional Convention in Philadelphia in 1787.

> *The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their*

offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office. (Article 3, Section 1)

The Power of Appointment

While the founders had no argument against a life term for Supreme Court justices, it took several months for a decision to be reached on who or what would have the authority to appoint new judges. The Virginia Plan presented to the Convention on June 6, 1787 proposed that the judiciary be chosen by the "national legislature." James Wilson of Pennsylvania warned that "intrigue, partiality, and concealment" might result from appointments entrusted to a body of people. James Madison proposed removing "appointment by legislature" from the clause and the phrase was left blank, to be filled upon "maturer reflection." Madison supported appointment by the Senate which he considered to be "numerous enough to be balanced. Not too numerous to be governed by other motives: stable and independent enough to follow their own judgments."

Throughout the summer most of the framers clung fast to the notion that the legislature—as a representative of the people—should select the judges. By August, however, mistrust of a "mass" decision prevailed and the Committee of Five recommended that the Senate appoint Supreme Court judges. That proposal in turn was rejected for the opposite reason: a majority of Senators who represented only a minority of the people could place a judge on the bench.

Not until late in the Convention could the framers agree that the President, as the officer of the people, was an appropriate authority to appoint judges, subject to approval by the Senate.

> *. . . and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States . . .* (Article 2, Section 2)

The Paradox of Independence

The widespread agreement on judicial independence may have been in reaction to George III's "usurpations," but it also reflected certain prevailing 18th-century beliefs about the effects of power on those who were entrusted to wield it. As a safeguard for the rights they claimed as an independent nation, the founders fashioned the government with the express purpose of controlling the officers and institutions of power. Concentrations of power were hothouses in which man's evil nature would flourish. The three branches were kept strictly separate to create a natural system of checks and balances, making it impossible for one branch, individual or scheming faction to wield power inde-

pendent of the others. The Supreme Court was envisioned as the ultimate check, the purest institution that would remain independent of political pressure and partisan motivations. The Court would protect the rights of the minority against the greed of the majority, restrain the executive from overindulgence in personal power, and demand that all legislation adhere to Constitutional principles.

But subsequent generations looking back to the creation of the American judiciary could see a paradox in its independence: the founders did not provide the same powerful checks on the Court as on the other branches. Yet the court was to be made of mortal men subject to the same temptations as any others. Why wouldn't independence create the danger of the accumulation of too much power? One answer was given by John Randolph at the Virginia ratifying convention in 1788.

> *... Have you anything to apprehend, when they can in no case abuse their power without rendering themselves hateful to the public at large? ... where power may be trusted, and there is no motive to abuse it, it seems to me as well to leave it undetermined as to fix it in the Constitution.*

The "Least Dangerous" Branch

The clue to the paradox of independence can be found in Federalist #78, without question the finest explanation of the intentions and philosophy of the framers as they created the framework of the judiciary branch. Written by "Publius" in May 1788, it explains the viability of the Court and its role in the complex scheme of the new government. Perhaps the greatest strength of the judiciary, in Publius' argument, was its weakness. It could be independent because it was the "least dangerous" branch.

Some modern readers have found it hard to believe that the framers envisioned the judicial as the least powerful of the three branches. But Publius' argument in Federalist #78 shows that this was one of the distinctive features of the Court.

> *Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society ... It may truly be said to have neither Force nor Will, but merely judgment ... The judiciary is beyond comparison the weakest of the three departments of power.*

The framers' belief in the frailty of the judicial branch stemmed largely from their adherence to the philosophy of Montesquieu who wrote "of the three powers ... the judiciary is next to nothing." Therefore it was more important to guard its independence than to check its powers. A real danger would have been created by giving judicial powers to the legislative or executive branches.

> *Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments ...*

And the separation of powers had to be constantly reinforced for

> *... as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches ....*

"During Good Behavior"

The independence of the judicial branch was provided for in the simple clause "during good behavior". Even though this clause was approved unanimously by the members of the convention, Publius found himself in the position of defending it to the more skeptical public.

> *The standard of good behavior for the continuance in office of the judicial magistry is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws ...*
>
> *... nothing can contribute so much to [the judiciary's] firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indespensible ingredient in its constitution; and in great measure as the citadel of the public justice and the public security.*

Publius and the founders firmly believed that the independence provided by the good behavior clause was crucial to the Court's ability to counteract the naturally power grasping legislative and executive branches. The Constitution needed constant defense, and this above all was what the judiciary became identified with.

> *If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for permanent tenure of judicial offices, since nothing will contribute so much as this to the independent spirit in the judges which must be essential to the faithful performances of so arduous a duty.*

The Court would also protect individual rights as part of its defense against what the founders saw as the "excesses" of democracy.

> *This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the acts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.*

The British Example and Anti-Federalist Opposition

Despite the fervor of revolutionary opposition to the monarchy, American institutions in the formative years were largely patterned on the British examples. In Federalist #78, Hamilton concludes his argument for the Court by commending the framers for following the example set by the British judicial system.

> *Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of this institution.*

But the example of Great Britain also presented the basis for criticism of the proposed Constitution. In a series of essays that appeared in the *New York Journal* during the spring of 1788, the Anti-Federalist writer "Brutus" focused on the good behavior tenure, not as the foundation of a fine judiciary, as Publius asserts, but as the source of potentially grave and dangerous consequences. His analysis was based on a comparison between the British and American systems:

> *The supreme court under this constitution would be exalted above all other power in the government, and subject to no control ...*
>
> *The judges in England are under the control of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will control the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress. They are to give the constitution an explanation, and there is no power above them to set aside their judgment ... they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself ...*

The British needed to establish a good behavior tenure, Brutus said, because a judiciary without it could not hold its own against the all-powerful monarchy. But no branch of the American government could ever pose the same threat. Why the founders gave the judiciary more independence than the British system was almost beyond Brutus' comprehension.

Impeachment

The only constitutional provision for removal of Supreme Court justices, as officers of the United States, is contained in Article II, Section 4:

> *The President, Vice President, and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes, and Misdemeanors.*

Brutus, once again foreshadowing criticisms of modern reformists, warned that such a clause did nothing to guard against routine misconduct and misjudgment. Only if judges could be proven absolutely "wicked and corrupt" would there be any hope of impeaching them. In the first years of the Court's existence it became very clear that bringing impeachment proceedings to fruition was a long and arduous task. In the past two hundred years only fifty-four federal judges have been investigated and of those only eight judges and one Supreme Court justice have been impeached. The last impeachment of a federal judge was over forty years ago. Lord Bryce spoke for many proponents of change when he said:

> *Impeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.*

There is some question as to whether the founders intended impeachment to be the *only* method of disciplining or removing federal judges. Controversy stems from varying interpretations of what the framers meant when they made provisions for impeachment. Some say they were careful to spell out the grounds for impeachment, because they were afraid it might be used as a weapon against the judicial branch. They did not go into detail about other review and removal procedures only because they expected these would be established as common administrative practices.

Modern advocates of tenure reform argue that impeachment was always cumbersome but in today's Congress it is even more so—its heavy legislative schedule simply does not allow time for the extended review and deliberation of impeachment proceedings. Others argue that the founders created a difficult impeachment process to guard judicial independence and it should be left that way.

Accountability

Brutus was not convinced that the judiciary was the "least dangerous" branch. In his opinion it was potentially the most powerful branch of all and the root of that power was the good behavior tenure. He appealed to the principles of republican government in urging that the Court be made accountable to some authority.

> *When great and extraordinary powers are vested in any man, or body of men, which in their exercise, may operate to the oppression of the people, it is of high importance that powerful checks should be formed to prevent the abuse of it.*
>
> *Perhaps no restraints are more forcible, than such as arise from responsibility to some superior power. Hence it is that the true policy of a republican government is, to frame it in such a manner, that all persons who are concerned in the government, are made accountable to some superior for their conduct in office. This responsibility should ultimately rest with the people.*

Brutus did not directly suggest the establishment of terms for judges as a solution to the need for accountability. That suggestion came later. He did say that "the supreme judicial ought to be liable to be called to account, for any misconduct, by some body of men, who depend upon the people for their places." Publius, however, was wary of placing the tools of accountability in the wrong hands, and especially of using the republican institution of renewable terms for that purpose.

> *That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to*

the branch which possessed it; if to both there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

Independence is at the root of Publius' defense of the Court and his resistance to limiting judicial tenure. Accountability is at the root of Brutus' criticisms of the judicial branch just as it is the major argument for the establishment of terms for judges. These two principles of republican government have continued to clash in subsequent attempts to reform the judiciary. Brutus wrote his arguments against the Supreme Court before it went into operation, but his judgments proved remarkably astute over time. He anticipated many of the criticisms that arose within the first decades of the new government and which are still very much alive in today's discussion of the judicial branch in general and the establishment of terms for judges in particular.

QUESTIONS FOR DISCUSSION

- Independence and accountability—are they irreconcilable? Can the Court be made more accountable without changing its independent character?

- Is independence necessary to do the job of safeguarding the Constitution and the rights it represents? What does the job of "safeguarding the Constitution" mean? Is it an active or a passive role?

- Is the Court still the "least dangerous" branch? If not, what has made it more dangerous?

- Is impeachment a strong enough check on the Court?

- Does "judicial independence" assume infallibility on the part of judges? Is it consistent with the checks on the other branches of government?

- Is it accurate to say that the Court as currently structured is removed from politics? Would it undermine the Court to politicize it?

- Would the creation of judicial terms give the legislative and executive branches a power that does not rightfully belong to them? Does power over the Court more rightfully belong to the people?

12

BEST COPY AVAILABLE

Partisanship and the Courts

The founders had intended the judiciary to be weak and nonpartisan; they assumed that it could be. History quickly proved them wrong. Power, partisanship, and the Court became inseparable and controversial issues. Even the men who had supported the theory of an independent judiciary found the reality difficult to live with. One of the most graphic examples of this is Thomas Jefferson who spent his two terms as President embroiled in battle with John Marshall and his Federalist Court. Jefferson's motivations were blatantly political—he wanted judges who supported his policies and would come to decisions in keeping with his political needs and beliefs.

Unable to weed the Federalist opposition out of the Court through constitutional means—by impeachment—Jefferson and his Republican Party attempted to change the system. John Randolph, a Virginia Republican, introduced the following Constitutional amendment:

> *The judges of the Supreme Court and all other courts of the United States shall be removed from office by the president in joint address of both Houses of Congress requesting the same.*

Thomas Jefferson himself was one of the first to propose establishing terms of office for justices as a means of controlling them.

The words of William Giles, a Virginia Congressman, bluntly expressed the opinion of many of his contemporaries in the early 19th century:

> *... all other Judges of the Supreme Court ... must be impeached and removed ... and if the Judges of the Supreme Court should dare, as they have done, to declare an Act of Congress unconstitutional, or to send a mandamus to the Secretary of State, as they have done, it was the undoubted right of the House of Representatives to impeach them, for giving such opinions, however honest or sincere they may have been in entertaining them ... A removal by Congress was nothing more than a declaration by Congress to this effect: you hold dangerous opinions, and if you are suffered to carry them into effect, you will work the destruction of the Union. We want your offices for the purpose of giving them to men who will fill them better.*

The struggle to control the Court has retained its partisan coloring up into the 20th century. Any change that would make the judiciary accountable to either the legislative or executive branch—such as terms subject to reappointment—would increase the chance of the Court being shaped for partisan purposes. It does not take great imagination to insert Giles' words in the mouths of a modern Senate denying reappointment to a sitting judge. "We want your offices for the purpose of giving them to men who will fill them better."

The more activist stance of the 20th century Court in ruling on issues such as reapportionment, busing, school prayer and abortion has added an extra edge to reform attempts. But the clear link between reforms and current-day legislative issues should not obscure the questions that will be of concern as long as the theory of separated powers remains at the heart of the American republic. Should the Court be more in touch with the political current or would it lose its power to protect the Constitution by being politicized? Is it realistic to assume that the Court can be independent?

Establishing Terms

Attempts to limit and control the judiciary have a history as varied as it is long. Of the methods calling for Constitutional amendment, establishing terms of office for the judiciary is the most frequently proposed.

Amendments to establish terms fall into three categories:

1. Absolute Limits on Tenure—These proposals would limit all judicial appointments to a single term of a fixed length, subject to the good behavior requirement. Within a lifetime a person could serve one term as an inferior court judge and one term as a Supreme Court justice but never two terms at the same level. A twelve-year term and a fifteen-year term have both been proposed.
2. Limited Term Subject to Popular Election—These proposals usually call for dividing the United States into nine judicial districts, each of which would elect a single Supreme Court justice and the necessary circuit and district judges. Terms would be six years in length with no limit on reelection eligibility.
3. Limited Term Subject to Reappointment—The most popular version of this proposal calls for ten year terms renewable upon nomination by the President and confirmation by the Senate. Two current variations on this theme include: 1) six or eight-year terms instead of ten and 2) reconfirmation by the Senate but no renomination by the President.

Proponents of establishing terms argue that the judiciary is too independent and removed from both the political considerations of the executive and legislative branches and the social considerations of the people. Although Brutus never suggested the establishment of terms for the judiciary all his fears and arguments are echoed by proponents of the amendment. The judicial branch has too much power; it has too much effect on the legislative process without being answerable to the people or their representatives. Terms are proposed to make the Court accountable for its actions. Those who argue against terms call

attention to the carefully crafted separation of powers created by the founders and argue for the continued independence of the judiciary and the need for a removed, non-partisan check on the other branches.

Periodic reappointment would also provide a way of ridding the judiciary of "problem judges," those unfit for office due to misconduct or physical or mental disability. Supporters of terms point out that impeachment is too cumbersome to be considered a real deterrent in cases of misconduct and that judicial review boards (see Related Reforms) would expose "dirty laundry" and damage the reputation of the entire branch. Reappointment procedures would provide a quick, painless, and routine way of insuring that only qualified judges remained on the federal bench. Opponents of establishing terms see the damage to the balance of power that would result from reappointment as a far greater danger than a few bad judges. Accountability versus independence and fit versus unfit judges are the two major themes of the debate over terms. These and other arguments are outlined below.

RELATED REFORMS

Establishing terms of office for the judiciary is only one of several proposed solutions to problems arising from too much judicial independence and the life tenure provision. One related proposal would make it easier to remove judges by setting up alternatives to impeachment. Another would institute a mandatory retirement age or at the very least encourage early retirement.

Alternatives to Impeachment—Attempts to change the judiciary began in 1791 with the call for a Constitutional amendment to give the President or Congress power to remove judges for misconduct short of impeachable crimes. More recently, judicial reformers have tried to second guess the impeachment clause through legislation rather than by amendment of the Constitution.

The Judicial Tenure Act is a good example of the type of disciplinary mechanism these reforms aim to create. Through a system of special "courts within the Court" the Act would mandate a procedure for retiring disabled judges and removing those who have not committed impeachable offenses, but "whose conduct is or has been inconsistent with the good behavior required by Article III, Section 1 of the Constitution." The members of these disciplinary bodies would have the power to review and remove judges of the inferior courts but only to review and recommend action in cases involving Supreme Court justices.

Mandatory or Early Retirement—The other major proposal to change the life tenure clause seeks to reduce the problem of senility on the bench by setting a retirement age. A Constitutional amendment calling for mandatory retirement at age seventy has been proposed. Some non-Constitutional solutions have attempted to encourage voluntary retirement. One proposal would permit a judge or justice to retire after eighty years of combined age and service, so that a judge could retire at age sixty-five if he had served fifteen years.

The major argument against retirement is that judges with valuable experience would be forced to retire regardless of their ability to serve. But supporters of retirement claim that retired judges can still contribute by serving when and where they are needed.

ARGUMENTS FOR ESTABLISHING TERMS

- Judges would be less "removed" and would have to be more responsive to the needs and realities of a changing society.

- A reappointment process would allow for periodic review of a judge's performance.

- Judges who did not perform their duties for reasons such as irresponsibility, disability, or senility could be removed at the end of their term without the stigma of impeachment.

- The Court has taken on a larger role in the legislative process and its power has grown considerably since the 18th century. Terms of office would institute a legislative check that is needed in light of this larger role.

- Renewable terms would politicize the Court, which would be a healthy development because it would create more cohesiveness in government policymaking.

- The higher turnover rate and lower average age of justices that would result from the establishment of terms of office would create a more innovative, contemporary Court.

- If the Court is going to rule on issues with immediate social implications, such as abortion and busing, it should be accountable for its actions to the people and their representatives.

ARGUMENTS AGAINST ESTABLISHING TERMS

- Reappointment by any body would create a dependent, biased judiciary, robbing the country of truly equal opportunity under the law.

- Well qualified and effective judges could be forced from office because they refused to subordinate themselves to the will of the appointing authority.

- Judges might tend to "campaign" when facing the possibility of reappointment, allowing political considerations to influence their decisions.

- Judges might deviate from the letter of the law in order to make decisions in keeping with the desires of the reappointing authority.

- Fixed terms would lead to a higher turnover in the courts, depriving the country of the experience and maturity that is important to fair judgment of the laws.

- The increased opportunity to appoint judges would allow Presidents to "stack" the courts to suit their political needs.

- Fixed term lengths might encourage Presidents to "give away" seats on the bench as political favors, knowing that it could do no permanent or even long range damage to the judiciary.

- Making the judiciary accountable to the legislative or executive branches would violate the separation of powers intended by the Constitution and greatly decrease the judiciary's ability to act as a check on the other branches.

- The incidence of truly incompetent or irresponsible judges is so low that it does not warrant jeopardizing the entire judicial system to correct a virtually non-existent problem.

ELECTION BY THE PEOPLE

Arguments For:

- A chance for the people to judge the performance of their justices and reconsider their qualifications.
- By making the Court accountable to the people directly, the Court would respond to the needs of society.
- "Judicial restraint" might become a reality.
- The public is more informed and educated than during the 18th century and is therefore able to make judgments on candidates for the Court.

Arguments Against:

- The general public is no more qualified to assess the legal qualifications of candidates than they were in the 18th century.
- If elected by the people the supreme law of the land would be overly affected by the passions of the majority.
- The people are not familiar enough with the complexities of the Constitutional system to fully understand the decisions made by the Court and could therefore not fairly assess the performance of each justice.
- Judges might be tempted to make decisions for the wrong reasons, campaigning to the majority rather than protecting the rights of all.

JUDICIAL TENURE
A BRIEF LEGISLATIVE HISTORY

1791 Constitutional amendment proposed which provided for an alternative to removal by impeachment; the first attempt to change the Court through Constitutional amendment.

1807–12 As a result of the Jefferson/Republican frustration with the Marshall/Federalist Court, nine Constitutional amendments relating to judicial tenure were introduced including the first to propose establishing terms.

1832 Authority of the Court was challenged by Andrew Jackson's administration. Proposed amendment limiting the terms of justices failed to pass the House by a vote of 115 to 61.

1870 First bill requiring mandatory retirement of federal judges failed enactment.

1936–50 Several bills providing for removal of unfit or problem judges without impeachment introduced. For example:

- 1936—Bill proposing establishment of High Court for Trial of Judicial Officers (except Supreme Court Justices).
- 1937—Bill providing that the House of Representatives could initiate hearings and conduct prosecution on behavior of federal judges passed House in 1938 but died in Senate.
- 1941—Same bill as above passed House but failed to win approval of the Senate.

1967–80 Over a dozen proposals introduced providing for popular election of federal judiciary.

1969 First proposal calling for a "judicial review board" composed of federal judges with power to recommend removal of peers (except for Supreme Court justices).

1970 Senate Judiciary Committee Subcommittee on the Separation of Powers concluded that 1969 proposal was "unconstitutional and a threat to the independence of the judiciary."

1974–78 Judicial Tenure Act calling for a judicial review board with power to investigate federal and Supreme Court justices introduced to Senate three times. Passed by Senate in 1978 but not acted on by House before close of 95th Congress.

1981 More than 25 "court-curbing" bills introduced in Congress to take away the Court's authority to hear cases on certain issues, such as abortion, desegregation and school prayer.

1984 Eight Constitutional amendments to establish judicial terms have been proposed in the 98th Congress to date.

SUGGESTED READINGS

Morton Borden, ed., *The Anti-Federalist Papers*, Michigan State University Press, 1965. (especially pages 222–240)

Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, (especially Volume III, The Virginia Debates), J.B. Lippincott, 1859.

Alexander Hamilton, John Jay and James Madison, *The Federalist Papers*, ed. with introduction by Garry Wills, Bantam Books, 1982. (especially numbers 78–82)

Raoul Berger, "Impeachment of Judges and 'Good Behavior' Tenure", *Yale Law Journal*, 1970

Harry F. Byrd, Jr., "Has Life Tenure Outlived Its Time?", *Judicature*, Vol. 59, January 1976.

Sam J. Ervin, Jr., "Separation of Powers: Judicial Independence", *Law and Contemporary Problems*, Volume 35, Winter 1970.

William Jeffrey, Jr., "The Letters of Brutus—A Neglected Element in the Ratification Campaign of 1787–88" (especially letters XI–XVI), *University of Cincinnati Law Review*, Vol. 40, 1963.

Judicial Discipline and Tenure Proposals, American Enterprise Institute Legislative Analyses, 1979.

Philip Kurland, "The Constitution and the Tenure of Federal Judges: Some Notes from History", *University of Chicago Law Review*, 1969.

Robert G. McCloskey, *The American Supreme Court*, University of Chicago Press, 1960.

Page Smith, *The Constitution—A Documentary and Narrative History*, Morrow Quill Paperbacks, 1980.

Preble Stolz, "Disciplining Federal Judges: Is Impeachment Hopeless?" *California Law Review*, 1969.

22

The Jefferson Foundation
1529 18th Street, N.W.
Washington, D.C. 20036
(202) 234-3688

The Jefferson Foundation is a non-profit, tax-exempt organization incorporated in Washington, D.C. The Foundation has two major purposes.

- *To enhance the public's critical understanding of the Constitution and its history by involving citizens in debate and discussion of the fundamental principles of American government.*
- *To study historical trends and stimulate citizen discussion of constitutional reforms which have been proposed in Congress and endorsed by various groups as ways of improving the structure and functioning of government.*

The Jefferson Foundation is a strictly non-partisan, non-advocacy organization which takes no position on any of the reform issues it studies. Its role is to promote informed and rational discussions of the fundamentals of the American system and to facilitate public understanding of how the Constitution was made.